STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

KIP DUNLAP, Complainant, vs. CITY OF BELLINGHAM, Respondent.	CASE 24946-U-12-6378 DECISION 11443 - PECB PRELIMINARY RULING AND CLARIFYING ORDER

On June 6, 2012, Kip Dunlap (Dunlap) filed an unfair labor practice complaint against the Washington State Council of County and City Employees, Council 2 (union) that was docketed as Case 24855-U-12-6343. A deficiency notice was issued, and on June 27, 2012, Dunlap filed an amended complaint that included claims against the City of Bellingham (employer). The claims against the employer were docketed as the present complaint—Case 24946-U-12-6378. Case 24855-U-12-6343 against the union was processed separately. The terms "complaint" and "amended complaint" in this ruling refer only to Case 24946-U-12-6378; the union is not a party to this case.

The complaint was reviewed under WAC 391-45-110,[1] and the deficiency notice issued on July 10, 2012, indicated that it was not possible to conclude that a cause of action existed at that time. Dunlap was given a period of 21 days in which to file and serve an amended complaint or face dismissal of the complaint. Dunlap filed an amended complaint on August 2, 2012.

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[1] At this stage of the proceedings, all of the facts alleged in the complaint are assumed to be true and provable. The question at hand is whether, as a matter of law, the complaint states a claim for relief available through unfair labor practice proceedings before the Public Employment Relations Commission.

The Unfair Labor Practice Manager finds a cause of action for interference allegations of the amended complaint against the employer concerning Dunlap's use of the employer's e-mail system. The employer must file and serve its answer to the amended complaint within 21 days following the date of this Decision.

DISCUSSION

The allegations of the complaint concern employer interference with employee rights in violation of RCW 41.56.140(1), and employer domination or assistance of a union by unlawful interference with internal union affairs in violation of RCW 41.56.140(2) [and if so, derivative interference in violation of RCW 41.56.140(1)], by its actions regarding Kip Dunlap. The deficiency notice pointed out the defects to the complaint.

Dunlap states that he used to the employer's e-mail system to send an e-mail to fellow union members concerning the ratification of a collective bargaining agreement. The e-mail included claims that union leaders had violated the union constitution. Dunlap alleges that the employer met with him twice, on May 1 and May 4, 2012, over allegations that he had violated the employer's e-mail policy in sending the union related e-mail. The complaint does not indicate that any discipline resulted from the meetings. The complaint also does not provide any information about the employer's e-mail policy to allow any determination about whether the employer's invoking the policy could be a pretext for action against Dunlap based on union activities. The complaint does not contain sufficient information to indicate that the meetings of May 1 and May 4 were substantially connected to Dunlap's union activities, rather than to the employer's concerns over its e-mail policy.

In addition, the Commission has only limited jurisdiction over internal union affairs. Unions are private organizations and their constitutions and procedures constitute contracts with their members for the conduct of union affairs. *Lake Washington School District*, Decision 6891 (PECB, 1999); *City of Bellingham*, Decision 6950 (PECB, 2000). It is not clear from the complaint whether the e-mail concerning contract ratification and alleged violation of the union's

constitution would constitute union activity within the Commission's purview. The substance of the complaint points to Dunlap's dispute with the union as being an internal union matter; for example, the complaint contains information about the union's communication with Dunlap over his appeal rights through internal union procedures. The complaint does not provide information indicating that the employer unlawfully interfered with Dunlap's employee rights in violation of RCW 41.56.140(1).

Regarding the claim for unlawful interference with internal union affairs in violation of RCW 41.56.140(2), the complaint must indicate that the employer has interfered with internal union affairs or finances in order to state a cause of action. However, there are no facts in the complaint that support the unlawful interference claim. As noted above, there is no indication that Dunlap's use of the employer's e-mail system was protected union activity.

Amended Complaint

Claims against the union are non-responsive—the union is not a party in Case 24946-U-12-6378

The amended complaint was filed two days late, but that is not fatal to Dunlap's response, and the amended complaint is accepted. Although the deficiency notice of July 10, 2012, stated that Case 24946-U-12-6378 would concern only the claim against the employer, the amended complaint retains the original complaint's allegations against the union. As explained in the deficiency notice of July 10, 2012, the claims against the union were processed in Case 24855-U-12-6343. That case was dismissed on July 10, 2012, in *City of Bellingham, (WSCCCE Council 2)* Decision 11422 (PECB, 2012). Dunlap has since filed an appeal with the Commission. Nevertheless, the amended complaint continues to allege union interference in violation of RCW 41.56.150(1), and the union inducing the employer to commit an unfair labor practice in violation of RCW 41.56.150(2). The allegations against the union contained in the amended complaint are in the main non-responsive to the deficiency notice in Case 24946-U-12-6378, except as they pertain to union representation in Dunlap's meetings with the employer on May 1 and May 4, 2012. The present Decision clarifies that Dunlap's claims against the union exist only in Case 24855-U-12-6343, and that Washington State Council of County and City Employees, Council 2,

is not a party to Case 24946-U-12-6378 and does not need to file an answer. Dunlap's only claim against the union is the aforementioned appeal to the Commission, and the union need only respond to that appeal.

Meetings with employers of May 1 and 4, 2012

Although as noted, Case 24946-U-12-6378 does not pertain to claims against the union, Dunlap provides new information in the amended complaint that was not included either in the original complaint or in the amendment to the complaint against the union in Case 24855-U-12-6343. Dunlap now alleges that when the employer summoned him to investigatory meetings on May 1 and May 4, 2012, that he did not have any union representation in those meetings. Dunlap has previously alleged that he requested the union president to represent him, but that the president refused. Dunlap alleges in the amended complaint that the president's refusal was the reason he was unrepresented in the meetings. However, Dunlap did not have an exclusive right to be represented only by the union president. The union decides who the union representative will be. *City of Tacoma,* Decision 11064 (PECB, 2011). At no time—in three separate pleadings—has Dunlap claimed that the union denied all requests to represent him, but has consistently claimed only that the union president refused to do so. (Original complaint, amended complaint against the union, amended complaint against the employer.) Dunlap has never presented evidence—or even claimed—that union representation was completely unavailable to him.

Dunlap's new claim leads to the question of whether the employer violated Dunlap's *Weingarten* rights under RCW 41.56.140(1), by denying his right to union representation during investigatory interviews. However, again, over three pleadings, Dunlap has never alleged that he made requests for union representation to the employer, and that the employer rejected his requests relative to one or both of the meetings. *City of Seattle,* Decision 2773 (PECB, 1987); *Washington State Patrol,* Decision 4040 (PECB, 1992).

The Unfair Labor Practice manager will not infer facts that do not exist in the pleadings and find a cause of action based upon guess-work, neither in supposing that the union might possibly have denied all representation, nor that the employer might possibly have denied Dunlap's requests for

union representation, even though Dunlap has never alleged—nor provided evidence for—any of those claims.

Employer Domination

The amended complaint withdraws the claim of employer domination or assistance of a union in violation of RCW 41.56.140(2) [and if so, derivative interference in violation of RCW 41.56.140]: The boxes on the amended complaint form relating to employer domination are not checked; the statement of facts and remedy request refer only to the interference allegation.

Independent Interference allegations state a cause of action

The amended complaint does not allege that Dunlap has been denied ascertainable rights, benefits, or status by the employer, including discipline and revocation of e-mail privileges. Thus, the only cause of action under RCW 41.56.140(1) is for independent interference. It is an unfair labor practice in violation of RCW 41.56.140(1) for an employer to make threats of reprisal or force or promises of benefit to employees in connection with the employees' union activities. The amended complaint provides information on the employer's e-mail policy. The policy allows employees to use the employer's e-mail system to conduct union business. Dunlap alleges that he did so, and that the employer requested him to attend the meetings of May 1 and 4 regarding his use of the employer's e-mail. Dunlap alleges that the employer's actions constituted interference. The application of the employer's policy to Dunlap's e-mails, and the issue of whether the employer's meetings with Dunlap constituted interference with his collective bargaining rights, are questions of fact and state a cause of action.

NOW, THEREFORE, it is

ORDERED

1. Assuming all of the facts alleged to be true and provable, the interference allegations of the amended complaint state a cause of action, summarized as follows:

> Employer interference with employee rights in violation of RCW 41.56.140(1), by threats of reprisal or force or promises of benefit made to Kip Dunlap in connection with his union activities in using the employer's e-mail system.

The interference allegations of the amended complaint will be the subject of further proceedings under Chapter 391-45 WAC.

City of Bellingham shall:

> File and serve its answer to the allegations listed in Paragraph 1 of this Order, within 21 days following the date of this Order.

An answer shall:

a. Specifically admit, deny or explain each fact alleged in the amended complaint, as set forth in Paragraph 1 of this Order, except if a respondent states it is without knowledge of the fact, that statement will operate as a denial; and

b. Assert any affirmative defenses that are claimed to exist in the matter.

The answer shall be filed with the Commission at its Olympia office. A copy of the answer shall be served on the attorney or principal representative of the person or organization that filed the amended complaint. Service shall be completed no later than the day of filing. Except for good cause shown, a failure to file an answer within the time specified, or the failure to file an answer to specifically deny or explain a fact alleged in the amended complaint, will be deemed to be an admission that the fact is true as alleged in the amended complaint, and as a waiver of a hearing as to the facts so admitted. WAC 391-45-210.

2. The allegations of the amended complaint in reference to the union are non-responsive to the deficiency notice issued on July 10, 2012. Dunlap's claims against the union exist only in Case 24855-U-12-6343, currently on appeal before the Commission. The union need only respond to the appeal in that case. Case 24946-U-12-6378 applies only to the employer, and the union does not need to file an answer.

ISSUED at Olympia, Washington, this 9th day of August, 2012,

PUBLIC EMPLOYMENT RELATIONS COMMISSION

DAVID I. GEDROSE, Unfair Labor Practice Manager

Paragraph 2 of this order will be the final order of the agency unless a notice of appeal is filed with the Commission under WAC 391-45-350.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY /S/ ROBBIE DUFFIELD

CASE NUMBER:	24946-U-12-06378	FILED:	06/27/2012	FILED BY:	PARTY 2
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BAR UNIT:	PUBLIC WORKS				
DETAILS:	-				
COMMENTS:					

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